Supreme Court, U.S.

No. 981093 JAN 4 - 1999

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ADCO OIL COMPANY,

Petitioner,

v.

THE HOME INSURANCE COMPANY OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

E. VANCE WINNINGHAM, ESQUIRE
Counsel of Record
2200 NW 50th Street, Suite 240
Oklahoma City, Oklahoma 73112
(405) 843-1037

Attorney for Petitioner

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

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QUESTIONS PRESENTED FOR REVIEW

1. Where an insured attorney deliberately refused to report a claim to his liability insurance carrier and he also actively concealed his insurer's claims-made coverage from the claimant and a court (in avoidance of a court rule requiring disclosure), thereby delaying the claimant from providing direct notice to the insurer until sixty-nine days after the policy period, does the public policy requirement of the State of Illinois ("such policies should operate to afford affected members of the public the maximum protection possible when it is otherwise consonant with fairness to the insurer") prevent the insurer from benefiting from the insured's deliberate and affirmative acts of concealment to delay notice, absent the insurer showing any prejudice resulted from such delay?

2. Should the Circuit Court of Appeals have granted the insurer's Motion to Certify this public policy issue to the Illinois Supreme Court, because such issue ". . . cannot be answered by reference to controlling Illinois Supreme Court precedent", instead of reversing the U.S. District Court's decision which relied on a specific Illinois Court of Appeals decision which the insurer had first asserted was a controlling precedent below for the purpose of establishing its right to obtain a default judgement against it's insured, this despite petitioner-claimant's concurrence the issue should be certified if the U.S. District Court's reliance on the Illinois Court of Appeals case was misplaced (in which event petitioner conceded this case would present a public policy issue of first impression in not only Illinois, but in every jurisdiction in the United States as well)?

3. Should this Court deviate from its normal practice of declining to review a Circuit Court's interpretation of state public policy law because this decision can be expected to have a substantial detrimental national impact upon the claims-made liability insurance sector (medical, dental, legal, accounting, engineering, architectural, etc.), which has now virtually eliminated all predecessor occurrence policies, because this Circuit decision vests an insured with the power to deliberately void coverage virtually at will of otherwise accrued and covered claims by permitting an insured to affimatively conceal such coverage from a client-claimant, a court, and presumably anyone else and thereby: (a) effectively permit an insurer to avoid coverage without any showing of prejudice; or (b) enable the insured to effectively utilize this power to pressure if not effectively extort settlements or agreements from claimants to limit any recovery to the insured's policy limits?

LIST OF ALL PARTIES BELOW

The caption contains the names of all parties to the proceedings in the court of appeals.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

LIST OF ALL PARTIES BELOW iii

TABLE OF CONTENTS iv

TABLE OF CONTENTS TO APPENDICES v

TABLE OF AUTHORITIES vi

OPINIONS AND ORDERS BELOW 1

BASIS FOR JURISDICTION IN THIS COURT ... 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

A. Illinois Public Policy 7

B. Public Policy Consequences 12

C. Public Policy Prevails Over Private Contract Provisions 15

D. The Public Policy Expressed In *Reagor* Does Not Unreasonably Restrict An Insurer's Ability To Condition The Terms Of Its Coverage Because The Application Of That Policy Must Be "Consonant With Fairness" To The Insurer 19

CONCLUSION 21

TABLE OF CONTENTS TO APPENDICES

APP. PAGE

A—United States Court of Appeals for the Seventh Circuit, Order reversing the district court and remanding the case with instructions to enter a declaratory judgment that Respondent had no duty to defend or indemnify Michael J. Rovell in Petitioner's suit A-1

B—United States District Court for the Northern District of Illinois, Eastern Division, Order granting Petitioner's cross-motion for summary judgment B-1

C—United States Court of Appeals for the Seventh Circuit, Order denying Petitioner's petition for rehearing with suggestion for rehearing en banc C-1

TABLE OF AUTHORITIES

CASES: PAGE(S)

Allstate Ins. Co. v. Tucker, 178 Ill.App.3d 809, 533 N.E.2d 1004 (1989) 11

American Country Insurance Co. v. Bruhn, 289 Ill.App.3d 241, 682 N.E.2d 366 (2d Dist. 1997) 15-16, 19

Barrington Consolidated High School v. American Insurance Co., 58 Ill. 2d 278, 319 N.E.2d 25 (1974) 18

Cincinnati Insurance Co. v. Baur's Opera House, Inc., 694 N.E.2d 593, [Ill. App. 4th Dist. 1998]) 13, 15, 16, 17

In Re George Anastaplo, 3 Ill.2d 471, 121 N.E.2d 826 (1954) 9

Gothberg v. Nemerovski, 58 Ill.App.2d 372, 208 N.E.2d 12 (1965) 8

Graman v. Continental Casualty Co., 87 Ill.App.3d 896, 409 N.E.2d 387 (5th Dist. 1980) 20

M.F.A. Mutual Insurance Co. v. Cheek, 34 Ill.App.3d 209, 340 N.E.2d 331 (1975), aff'd, 66 Ill.2d 492, 6 Ill.Dec. 862, 363 N.E.2d 809 (1977) 8

Reagor v. Travelers Insurance Co., 92 Ill.App.3d 99, 415 N.E.2d 512 (Ill.Ct.App. 1st Dist., 3d Div. 1980, rehearing den. 1981) . . . . . *passim*

Transport Insurance Co. v. Post Express Co.,
138 F.3d 1189 (7th Cir. 1998) 17

OTHER:

Black's Law Dictionary, 6th Ed., 1990 . . . . . 9, 10, 15

4 A. Corbin, Contracts §807 (1951) 8

OPINIONS AND ORDERS BELOW

The September 4, 1998 order of the United States Court of Appeals for the Seventh Circuit reversing the District Court below, and remanding the case with instructions to enter a declaratory judgment that Respondent had no duty to defend or indemnify Michael J. Rovell in Petitioner's suit appears in the appendix hereto, App. #A.

The United States District Court for the Northern District of Illinois, Eastern Division's, December 3, 1997 Memorandum Opinion and Order granting Petitioner's cross-motion for summary judgment appears in the appendix hereto, App. #B.

The October 5, 1998 order of the United States Court of Appeals for the Seventh Circuit denying Petitioner's petition for rehearing with suggestion for rehearing en banc appears in the appendix hereto, App. #C.

BASIS FOR JURISDICTION IN THIS COURT

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on September 4, 1998.

The order of the United States Court of Appeals for the Seventh Circuit denying a petition for rehearing en banc was entered on October 5, 1998.

This Court has jurisdiction to review the judgment in question on a writ of certiorari pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

There are no statutory provisions involved.

STATEMENT OF THE CASE

Petitioner appeals the decision of the court below which dismissed Petitioner's motion for rehearing, reversed the District Court below, and remanded the case with instructions to enter a declaratory judgment that Respondent had no duty to defend or indemnify the insured-defendant in Petitioner's legal malpractice suit against the insured.

Petitioner, Adco Oil Company ("Petitioner"), instituted a malpractice suit against its former attorney Michael J. Rovell ("Rovell" or "the insured") in a U.S. District Court in Oklahoma. As co-plaintiff, Petitioner had hired Rovell to pursue a civil suit in Oklahoma state court. Even though a jury trial entered judgment for $120 million in Petitioner's favor, Petitioner never collected any part of that judgment due to Rovell's alleged breaches of duty to Petitioner.

When Petitioner served Rovell with its malpractice complaint, Rovell had a three million dollar "claims-made" legal liability policy issued by Respondent here, The Home Insurance Company of Illinois ("Respondent"). Had Rovell reported Petitioner's claim to Respondent during the policy period, there would be no question that Respondent's malpractice policy would have covered it. The policy lapsed only because Rovell failed either to report the claim himself or to disclose the existence and terms of his insurance policy to Petitioner so that it could report the claim. Rovell con-

tended he did not file the claim with his carrier because he believed Petitioner's claims were frivolous, the filing of a claim would negatively impact his insurance rates, and he did not want to pay the $10,000 deductible. Rovell intended to void coverage under his existing policy for Petitioner's claim.

To do that, Rovell concealed the policy from Petitioner until the policy period had lapsed. Yet the trial court's Local Rules required that prior to the first status and scheduling conference, both the existence of and content of any insurance policy that may be liable to satisfy part or all of a judgment which may be entered in the action be disclosed to opposing parties without awaiting a discovery request. The court docketed this status and scheduling conference for a date which would have been within the effective policy period. Instead of complying, two weeks before the scheduled status conference deadline for him to disclose the carrier's identity, Rovell applied to the court for a continuance because he would be out of town on a family vacation, and thus he would be unavailable to attend the status conference as currently scheduled. He represented to the court, "A continuance of the status conference should have no impact on any deadlines in the case." The result was the district court struck the scheduled status conference and rescheduled it to a later date, which date was after the policy period had lapsed.

Then Rovell filed a petition in bankruptcy. He is now the debtor in possession in a Chapter 11 reorganization in the United States Bankruptcy Court in the Northern District of Illinois. Forced by Petitioner's motion in the bankruptcy court, Rovell was ordered to notify Respondent of Petitioner's lawsuit and to seek coverage. Peti-

tioner had given Respondent direct notice sixty nine days after the policy period had lapsed.

After that, Respondent insurance carrier filed a declaratory action in bankruptcy court against both Rovell and Petitioner as party defendants. Respondent sought a declaratory judgment that it had no duty to defend or indemnify Rovell in Petitioner's action. Rovell ignored the adversary action, and judgment was entered against him in Respondent's favor by default.

Respondent voluntarily dismissed the action against Petitioner and refiled a substantively identical complaint against Petitioner in the United States District Court for the Northern District of Illinois, Eastern Division. There, ruling upon cross motions for summary judgment, the district court ruled in favor of Petitioner. It found there was an Illinois public policy precedent which acknowledged that Petitioner's rights as claimant under the policy vested at the time its malpractice action was filed, and thereafter the insured lawyer could not unilaterally act to defeat those vested rights under the policy. Thus when Rovell intentionally failed to report Petitioner's claim to Respondent and concealed the existence and terms of his policy from Petitioner, in violation of a local court rule (to prevent Petitioner from reporting the claim itself), those acts violated the public policy of Illinois. Consequently, the Respondent's late-reporting of claims defense in the insurance contract, standing alone, would not be enforced against Petitioner as a third party beneficiary with vested rights.

When Respondent appealed, the United States Court of Appeals for the Seventh Circuit, reversed the District

Court's judgment and remanded the case with instructions to enter a declaratory judgment that Respondent had *no* duty to defend or indemnify Rovell in Petitioner's suit.

Petitioner filed a petition for rehearing with suggestion for rehearing en banc with the Seventh Circuit Court of Appeals. The petition for rehearing was denied, and the suggestion for a rehearing en banc was rejected on October 5, 1998.

REASONS FOR GRANTING THE WRIT

This petition for writ of certiorari should be granted for the following reasons. This court's reversal of the district court's application of existing Illinois public policy[1] is exceptionally important because it determined that owner-insureds of Illinois claims-made liability insurance policies (i.e. lawyers, doctors, accountants,

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[1] . . . liability insurance is no longer considered merely a private matter between an insured and an insurer . . . liability insurance abounds with public policy considerations . . . injured members of the general public are beneficiaries of liability insurance policies . . . an injured person has rights under the policy which vest at the time of the occurrence giving rise to his injuries . . . *neither the insured nor the insurer, acting separately or together, may act to defeat the rights of the injured person* . . . such policies should operate to afford affected members of the public the maximum protection possible *consonant with fairness to the insurer* . . . (Emphasis added).

[See *Reagor v. Travelers Insurance Co.*, 92 Ill.App.3d 99, 415 N.E.2d 512, at 514) (Ill.Ct.App. 1st Dist., 3d Div. 1980, rehearing den. 1981)]

engineers, architects, contractors, ad infinitum) can make misrepresentations and actively conceal their insurer's identity in order to void coverage of the third party beneficiary injured party's claim and thus prevent the injured party from giving the insurer timely notice of the claim during the policy period.

Secondly, if existing Illinois public policy is not applicable to the facts of this case, then this court's decision has determined a substantial legal issue of first impression, involving Illinois law-public policy. There are no reported cases in Illinois (or in any other U.S. jurisdiction) which involve an insured attorney who deliberately decided not to notify his insurer of a claim. Nor is there a reported case of an insured attorney who deliberately concealed his liability coverage from the injured party until after the policy period had lapsed. Petitioner concurred with Respondent's contention that the issues in this case "cannot be answered by reference to controlling Illinois Supreme Court precedent" if the public policy articulated in *Reagor v. Travelers Insurance Co.*, 92 Ill.App.3d 99, 415 N.E.2d 512 (1st Dist. 1980) is determined to be vague when applied in context. Petitioner stated the issue for certification to the Illinois Supreme Court to be this:

> Where the insured attorney deliberately refused to report a claim to his carrier and acted willfully and deliberately during the policy period, thereby concealing his insurer's identity from the claimant (in avoidance of a federal local court rule requiring disclosure) until after the policy period had lapsed, does the public policy of the State of Illinois as expressed in *Reagor v. Travelers Ins. Co.* prevent the insurer from relying upon the late notice reporting provisions in

the insurance contract to defeat the third party beneficiary injured claimant's vested rights to coverage?"

A. Illinois Public Policy

I. It is the public policy of Illinois that neither the insured nor the insurer, after the insured event, may defeat the injured claimant's rights as an incidental beneficiary under the insurance contract, when it is consonant with fairness to the insurer.

The public policy of Illinois has recognized that when injury results from an insured's negligence, the injured party becomes a third party beneficiary with vested rights in the insured's liability policy which can not be defeated by the insured's subsequent acts. In 1980, the Illinois Appellate Court applied this public policy in the context of a premises liability policy, *Reagor, supra*. The logic of *Reagor* controls the instant case. In *Reagor*, the plaintiff dived into a lake created by the insured defendant, struck a sand bar, and sustained injuries. The insured and the insurer agreed there was no coverage for the claim. The court concluded such an agreement would not preclude a resolution of the coverage issue by the claimant for the reason that neither the insured nor the insurer could act to defeat the rights of the claimant. The court stated:

> Neither the insured nor the insurer, acting separately or together, may act to defeat the rights of the injured person. [Cases omitted].
>
> Travelers argues that there is no legal relationship between the parties since plaintiffs were not parties to the insurance contract. However, liability insurance is no longer considered mere-

> ly a private matter between an insured and an insurer. See M.F.A. Mutual Insurance Co. v. Cheek, 34 Ill.App.3d 209, 217, 340 N.E.2d 331, 337 (1975), aff'd, 66 Ill.2d 492, 6 Ill.Dec. 862, 363 N.E.2d 809 (1977). Rather, liability insurance abounds with public policy considerations, one of which is that the risk spreading theories of such policies should operate to afford affected members of the public the maximum protection possible consonant with fairness to the insurer. M.F.A. Mutual, 66 Ill.2d at 501, 6 Ill.Dec. at 866, 363 N.E.2d at 813; Government M.F.A. Mutual, 66 Ill.2d at 501, 6 Ill.Dec. at 866, 363 N.E.2d; Gothberg v. Nemerovski, 58 Ill.App.2d 372, 386, 208 N.E.2d 12, 20 (1965); 4 A. Corbin, Contracts §807 (1951)

Reagor, supra, at 514.

Thus liability insurance exceeds the insurer-insured bargained for terms and provisions contained in the insurance contract to protect the public interest. This is especially true where the insurer can not show detriment occasioned by notice delay. It is manifestly obvious that legal malpractice insurance liability contracts are not written in a vacuum. Rather they are written within the penumbra of state and federal local court rules. As the insurer, Respondent must expect that its insured will comply with local court rules in the malpractice action which itself comprises the "claim."

The attorney-client relationship is recognized as the highest of fiduciary relations; and has been characterized by the Illinois Supreme Court as follows:

> "The relation of the court and its attorneys to the people is one of high responsibility, involving on the one hand complete trust confidence

> and on the other absolute fidelity and integrity." *In re George Anastaplo,* 3 Ill.2d 471, 121 N.E.2d 826 (1954).

Liability insurance policies are written to cover the errors and omissions of attorneys who the insurer knows are fiduciaries' of their clients. "Fiduciary: . . . A person having duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking," in "scrupulous good faith and candor." "Fiduciary Duty: A duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law (*e.g.,* trustee, guardian)." (*Black's Law Dictionary*, 6th Ed. 1990).

Where most current professional liability policies are now written on a "claims made and/or reported" basis, effectively to grant such coverage an exemption from the Illinois public policy as expressed in *Reagor* would legitimate a new bargaining tool which unscrupulous entities or individuals could utilize to craft strategies unilaterally to force reduced settlements upon client-claimants (*i.e.*, validation of an insured's ability to void his policy coverage at will) would be a powerful weapon indeed to force a settlement upon a client-claimant. This leverage would be particularly acute if the insured were financially insolvent. To do so could also encourage collusion to eliminate/terminate coverage of vested claims. Assuming the opinion of the U.S. Court of Appeals for the Seventh Circuit's ("Circuit Opinion") strict interpretation/position is correct (private contract notice provisions must prevail over deliberate acts taken to defeat claims, etc.), nothing would prevent an insured and an insurer from canceling the policy during the

policy period by mutual agreement, which agreement one would expect to be cloaked by a non-disclosure clause. Yet, what would prevent an insurer from offering its insured a consideration (reduced premiums on future policies, etc.) for such termination?

Petitioner contends merely placing a policy limitation in the insuring agreement does not render it immune from the public policy constraints placed on liability insurance coverage expressed in *Reagor*. The public policy expressed in *Reagor* is applicable to the facts of the instant case, even though compliance with the notice provision is made a condition of the policy or is specified as a condition precedent to the liability of the insurer. A professional liability insurance contract must be written and interpreted in light of stated public policy considerations.

> *Public policy*. That principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good. The principles under which the freedom of contract or private dealings is restricted by law for the good of the community. The term "policy," as applied to a statute, regulation, rule of law, course of action, or the like, refers to its probable effect, tendency, or object, considered with reference to the social or political well-being of the state. Thus, certain classes of acts are said to be "against public policy," when the law refuses to enforce or recognize them, on the ground that they have a mischievous tendency, so as to be injurious to the interests of the state, apart from illegality or immorality.

Black's Law Dictionary, 6th Ed., 1990.

The public policy articulated in *Reagor* involved a balancing of the hardships, in favor of coverage and compensation for the injured client whenever either the insured or the insurer, acting singly or together, intentionally act to defeat coverage after an occurrence within the policy period.

> [W]e note that this court has stated: "[L]iability insurance is no longer considered merely a private matter between an insured and an insurer. *** In this respect, we adopt the position that injured members of the general public are beneficiaries of liability insurance policies."

Allstate Ins. Co. v. Tucker, 178 Ill.App.3d 809, 533 N.E.2d 1004, 1008 (1989), citing *Reagor*.

There will be no ripple effect upon future insurance cost and availability, because the district court's application of long standing Illinois public policy will not apply to the circumstance where an insured attorney *negligently* fails to report the claim during the policy period. Petitioner does not dispute that general law as applied to an insured's *negligent* failure to notify his carrier during the policy period.

The public policy of Illinois as reaffirmed in *Reagor* requires its application "to afford affected members of the public the maximum protection possible consonant with fairness to the insured." (*Reagor, supra,* at 514) Respondent did not dispute Petitioner's assertions that: (1) Respondent had not suffered any injury or prejudice as the result of its insured's intentional acts in refusing to report the claim nor of his causing the delay in Petitioner's reporting of same or (2) that in the ordinary course of business, when Respondent determines and sets their premiums for insuring an attorney(s) against

negligent discharge of their fiduciary duties, they would have envisioned (actuarially factored into their rate structure) a certain percentage of its insureds would deliberately (as opposed to negligently) seek to destroy any coverage their policies afford to such insureds or their clients to whom their fiduciary duty is owed.

Respondent, as the insurer of Rovell, had already assumed this risk for which it assessed and collected premiums; only by Rovell's concealment of their policy coupled with his willful decision not to notify Respondent of Petitioner's claim (both of which occurred during the policy period) was the policy's coverage (the "burden") potentially eliminated or lifted from Respondent. Public policy will not allow this result when it is otherwise consonant with fairness to Respondent. And Respondent cannot show any hardship or unfairness resulting from the failure to receive notice within the policy period. In the last analysis, the Circuit Opinion applies a rigid mechanical interpretation of the adhesion contract language to supersede the established Illinois public policy even when Respondent cannot show hardship.

B. Public Policy Consequences

This Circuit Opinion treated the fact that Rovell concealed Petitioner's claim from Respondent as irrelevant, stating carrying Petitioner's reasoning to its logical conclusion would foreclose enforcement of notice requirements. (App. A-2) Actually Petitioner's reasoning is much more limited. Petitioner contends it is only in the instance where the insured acts in a manner which defeats the vested right of an injured party that public policy applies to override the ordinary policy provision

defenses. Here it was the right of Petitioner to give actual notice to the insurer which Rovell defeated by concealing his policy contents from Petitioner until it was too late for Petitioner to give timely notice itself. For under Illinois Law, as the injured party, Petitioner had the right to give actual notice to Respondent if it had learned of the insurer's identity during the policy period. (*Cincinnati Insurance Co. v. Baur's Opera House, Inc.*, 694 N.E.2d 593, 596-7 [Ill. App. 4th Dist. 1998]).

This Circuit Opinion implies Petitioner's contention would "wipe out" cooperation and other policy provisions along with notice requirements. (App. A-7) This implication is incorrect. First Petitioner would note (1) Rovell has not refused to cooperate with Respondent, (2) has not "stipulated to liability," (3) has not "refused to make his records available," and (4) has not "insisted on managing his defense," nor has Respondent made any such allegations. To the contrary, Petitioner would concede any one of these hypotheticals, should they occur during the course of this litigation, could provide Respondent with a legitimate defense to coverage. Why? Because to prevent their enforcement would not be "consonant with fairness to the insured." And also because Petitioner has no right to force Rovell to cooperate. It has no right to force Rovell to stipulate to liability. It has no right to force Rovell to make his records available. But the federal court rule did give Petitioner the right to learn of the policy contents, and except for Rovell's obtaining a continuance through his misrepresentation to the court, Petitioner could have furnished actual notice to Respondent as allowed by Illinois law. (See *Cincinnati, supra*).

Whereas it would not be fair to permit Respondent to avoid coverage of Petitioner's claim *only as a result of Rovell's misconduct where he took away Petitioner's right to give actual notice to Respondent within the policy period.* Respondent did not dispute Petitioner's assertions that in the ordinary course of business, when Respondent determines and sets their premiums for insuring attorneys against negligent discharge of their fiduciary duties, Respondent would have envisioned (actuarially factored into their rate structure) a certain percentage of its insureds would deliberately (as opposed to negligently) seek to destroy any coverage their policies afford to such insureds or their clients to whom their fiduciary duty is owed.

Rovell assured Petitioner he maintained a multi-million dollar malpractice policy when Petitioner retained him to pursue its malpractice claims against his former attorneys. When the collectability of a potential judgment is doubtful, only injured parties who possess and are willing to gamble their substantial financial resources on the uncertain outcome of protracted litigation might elect to pursue liability claims. The odds such claims will be pursued become virtually infinitesimal when the potential for collection is highly speculative. This is due primarily to the fact injured parties normally have no legal method by which they may ascertain with certainty the value of an individual's personal unencumbered leviable financial assets until after they might obtain a final judgment. Even if ascertained, the nature and value of such assets may change substantially prior to judgment (i.e., unanticipated financial reverses, proactive estate planning, divorce, etc.). The ability of potential defendants to void their

liability insurance coverage after an injury occurs (which no insurer would ever be expected to protest) is a most potent financial weapon with which a tortfeasor could attempt to completely eliminate him or herself as a potential-target defendant. Based on this court's decision from which certiorari is sought, insured and their victims will now have no doubt of the tortfeasor's ability to void coverage by actively concealing it until the notice period has ended. This result is not only patently unfair, but will have a profound chilling effect upon injured parties' ability to obtain legal representation to pursue their claims on a contingency fee basis.

C. Public policy prevails over private contract provisions

A professional liability insurance contract issued in Illinois must be written and interpreted in light of Illinois public policy considerations.

> *Public policy*. That principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good. The principles under which the freedom of contract or private dealings is restricted by law for the good of the community.

Black's Law Dictionary, 6th Ed., 1990.

Ultimately, the Circuit Opinion states the question at hand to be whether Illinois enforces notice requirements in claims-made policies, and found it did, relying upon *Cincinnati, supra*, and *American Country Insurance Co. v. Bruhn*, 289 Ill.App.3d 241, 250, 682 N.E.2d

366, 372 (2d Dist. 1997). (App. A-5) Petitioner contends that is the wrong question at hand. Instead, the question should be whether or not Illinois public policy as expressed in *Reagor* would bar Respondent from raising this otherwise general rule of law upholding policy defenses. *Cincinnati* itself notes the general rule that the insured's failure to comply with the notice provision allows the insurer to deny coverage under the insurance policy, but specifies the general rule only applies "*absent some public policy reason barring Cincinnati from raising this defense.*" *Cincinnati, supra,* at 596. There, when defendant was sued in federal court, its insurer defended and the complaint was dismissed for lack of jurisdiction. Subsequently, when suit was filed in state court soon thereafter, for unexplained reasons the insurer was not notified of that new suit until two and one half years later. In a declaratory action by the insurer against defendant's estate, the insurer raised breach of notice defense under the policy. Defendant argued that notice in the federal lawsuit was tantamount to notice in the new state lawsuit and was sufficient. The court refuted that argument and held for the insurer on the basis that the mere possibility plaintiff would refile suit in state court was insufficient to constitute "actual notice" of the new lawsuit, and the two and one half year delay was unreasonable.

The *Cincinnati* court noted that in *occurrence* policy situations, previously the appellate courts had held lack of prejudice is a factor to be considered *only* when there is a reasonable excuse for the delay in notice. However, the court observed the appellate court recently had held that for an insurer to escape liability, it now must suffer prejudice as a result of the insured's failure to

timely notify it of a lawsuit. *Cincinnati*, *supra* at 598. Because the statute of limitations had run on other possible contribution claims, the court held the insured (Cincinnati) *had* been prejudiced in its inability to seek contribution from others.

Applied to the case at bar, *Cincinnati* would suggest there are situations where public policy *can* override the general contract defense provisions. Petitioner contends the case at bar is one of them, because in order to defeat Petitioner's claims, Respondent must indirectly be a beneficiary of and rely upon Rovell's acts of concealment in violation of a court rule.

In the case at bar, this Circuit Opinion cited an *occurrence* policy case and noted an insurer has a strong interest in prompt notice about claims under an occurrence policy, citing *Transport Insurance Co. v. Post Express Co.*, 138 F.3d 1189, 1191-92 (7th Cir. 1998). (App. A-5) On the one hand the occurrence case did discuss the importance that insurers need swift notice so that they can preserve evidence, interview witnesses while memories are fresh, and monitor the victim's medical care; the delay had been two years. On the other hand, in a simple fashion, the court in *Transport* resolved all its concerns by finding one fact, "All that need be said to resolve today's case is that Fuller actually notified Postma immediately after the accident and that Transport Insurance has waived any argument that Postma had to notify it with equal dispatch." *Transport*, *supra*, at 1192.

The fact the insurer had been notified immediately after the accident was dispositive of the case. But this should not rule out the possibility Illinois public policy

prevents Respondent from relying upon Rovell's affirmative misconduct and violation of a federal court rule as a successful bar in a claims-made policy because of which notice was received sixty-nine days after the policy period.

Petitioner's claim was asserted in its suit against Rovell which was filed five months before the end of Respondent's policy period. It was only through Rovell's deliberate misconduct of concealing Respondent's identity from Petitioner until the policy period passed that coverage of Petitioner's claim was eliminated (assuming the circuit court decision remains unchanged). Petitioner submits Illinois public policy should not allow this result when it is otherwise "consonant with fairness" to Respondent.

This Circuit Opinion notes that Illinois gives insureds a "reasonable" time to notify insurers under occurrence policies, citing *Barrington Consolidated High School v. American Insurance Co.*, 58 Ill. 2d 278, 319 N.E.2d 25 (1974) for authority. (App. A-5) In that case, the question presented was whether the requirement of giving notice under the policy was satisfied. In 1965 a school girl had hurt her leg and had written a timely letter to the school, but the letter did not suggest the school was liable for the injury. When she sued the school four years later, the school's insurance carrier refused to defend on the ground it had not been notified "as soon as practicable." In deciding the issue, the court noted the requirement means within a reasonable time, and what is a reasonable time depends upon the facts and circumstances of the case. *Barrington, supra,* at 27. The court found the "as soon as practicable" requirement *was* satisfied because earlier there had been no grounds

to believe that a claim under the liability policy would be made when considering the letter written in 1965. Thus the notice given near the time of the filing of the lawsuit was determined to be "as soon as practicable," regardless of when the injury occurred.

Discussing Respondent's observation that Illinois law permits insurers to condition indemnity on timely notice of casualties, this Circuit Opinion cited *American Country, supra*, for authority. (App. A-2) While that case did state an insured's duties are defined and controlled by the terms of the insurance contract, it further analyzed the law and stated, "Thus, a lengthy delay in providing notice is not an absolute bar to recovery under an insurance policy requiring notice. . . [Case omitted] In certain circumstances, delays in providing notice are excusable and will not bar coverage." *American Country, supra,* at 371.

D. The public policy expressed in *Reagor* does not unreasonably restrict an insurer's ability to condition the terms of its coverage because the application of that policy must be "consonant with fairness" to the insurer.

Query, where an injured party has a right to learn of the policy contents within the policy period, and the insured wipes out this right by acts which violate a court rule, does Illinois public policy allow the insurer to take advantage of the insured's duplicity and bar payment of claims based upon breach of notice provisions of the policy?

This Circuit Opinion states carrying Petitioner's reasoning to its logical conclusion would foreclose enforce-

ment of notice requirements and abolish claims-made policies, although Illinois law permits both, citing *Graman v. Continental Casualty Co.*, 87 Ill.App.3d 896, 899, 409 N.E.2d 387, 390 (5th Dist. 1980). (App. A-2) That claims-made policy case is inapposite to the case at bar because in *Graman* the suit was not filed during the policy period, and the insurer did not receive notification thereof until more than three years after the effective cancellation date. It is obvious why the court there denied coverage, because there was no other public policy consideration applicable. In the instant case, Petitioner's suit against Rovell *was* filed within the policy period. Respondent was notified of Petitioner's claim only sixty-nine days after the policy period, and that delay was solely due to Rovell's misrepresentation which concealed Respondent's identity from Petitioner in violation of a federal court rule.

There will be no ripple effect upon future insurance cost and availability, because the district court's application of Illinois public policy will not apply to the circumstance where an insured attorney negligently fails to report the claim during the policy period. Petitioner does not dispute that general law as applied to an insured's *negligent* failure to notify his carrier during the policy period.

Nor for Petitioner to prevail does this policy have to encompass only the factual circumstance where the insured deliberately elects not to submit a claim or provide notice to the insurer during the policy period. Instead, Rovell's active concealment by misrepresentation to the federal court was the act which divested Petitioner of its legal right to notify Respondent.

CONCLUSION

For the foregoing reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

E. VANCE WINNINGHAM, ESQUIRE
Counsel of Record
2200 NW 50th Street, Suite 240
Oklahoma City, Oklahoma 73112
(405) 843-1037

Attorney for Petitioner

APPENDICES

TABLE OF CONTENTS TO APPENDICES

APP. PAGE

A—United States Court of Appeals for the Seventh Circuit, Order reversing the district court and remanding the case with instructions to enter a declaratory judgment that Respondent had no duty to defend or indemnify Michael J. Rovell in Petitioner's suit A-1

B—United States District Court for the Northern District of Illinois, Eastern Division, Order granting Petitioner's cross-motion for summary judgment B-1

C—United States Court of Appeals for the Seventh Circuit, Order denying Petitioner's petition for rehearing with suggestion for rehearing en banc C-1

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 98-1055

THE HOME INSURANCE COMPANY OF ILLINOIS,

Plaintiff-Appellant,

v.

ADCO OIL COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 C 6464—**Robert W. Gettleman**, *Judge*.

ARGUED MAY 27, 1998—DECIDED SEPTEMBER 4, 1998

Before BAUER, EASTERBROOK, and DIANE P. WOOD, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Adco Oil Company has not fared well in the market for legal services. In 1988 it hired attorney Michael J. Rovell to sue Guy Taylor and his law firm for malpractice. By outward appearances Rovell did a good job. After a jury trial a judgment for $120 million was entered in Adco's favor. But Adco never saw a penny of that judgment and Adco now has filed suit accusing Rovell of malpractice. The complaint alleges that without Adco's consent Rovell made an agreement with Adco's co-plaintiff and adversaries that left Rovell with $265,000 in fees and Adco with nothing. Rovell has since filed a petition in bankruptcy (he is the debtor in possession in a Chapter 11 reorganization). Adco wants to collect from Rovell's mal-

practice carrier, The Home Insurance Company. Rovell has done his best to frustrate Adco. He refrained from notifying Home of Adco's malpractice suit, and its claims-made policy expired before Home learned of the proceeding. Rovell also ignored the adversary action Home initiated in the bankruptcy case. Following this default Bankruptcy Judge Ginsberg entered a declaratory judgment that Home need not defend or indemnify Rovell.

Adco contends, however, that the policy remains available, faulty notice and default judgment notwithstanding. Adco concedes that Rovell did not comply with the policy's notice provision but insists that this does not matter. Illinois (whose law, the parties agree, controls) prevents injurers and their insurers from destroying the "vested rights" of injured parties. *France v. Citizens Casualty Co.*, 400 Ill. 55, 79 N.E.2d 28 (1948); *Scott v. Freeport Motor Casualty Co.*, 392 Ill. 332, 64 N.E.2d 542 (1945); *Reagor v. Travelers Insurance Co.*, 92 Ill. App. 3d 99, 415 N.E.2d 512 (1st Dist. 1980). Adco contends that, as a result, Rovell's decision to conceal Adco's claim from Home may not be a basis for denying coverage. For its part, Home observes that Illinois law permits insurers to condition indemnity on timely notice of casualties. E.g., *American Country Insurance Co. v. Bruhn*, 289 Ill. App. 3d 241, 682 N.E.2d 366 (2d Dist. 1997). Carrying Adco's reasoning to its logical conclusion would foreclose enforcement of notice requirements, if it would not abolish claims-made policies, though Illinois law permits both. See, e.g., *Graman v. Continental Casualty Co.*, 87 Ill. App. 3d 896, 899, 409 N.E.2d 387, 390 (5th Dist. 1980). The district court agreed with Adco's arguments and granted summary judgment in its favor. 965 F. Supp. 1147, 987 F. Supp. 1057 (N.D. Ill. 1997).

First we must inquire whether the district court had subject-matter jurisdiction, a topic the judge did not explore. Home invoked the diversity jurisdiction. 28 U.S.C. §1332. Home and Adco are of diverse citizenship, and the amount in controversy exceeds the jurisdictional minimum. But Home's dispute with Adco arises out of its policy with

Rovell, and the normal alignment of parties in a suit seeking a declaratory judgment of non-coverage is Insurer versus Insured and Injured Party. Both Home and Rovell are citizens of Illinois, which forecloses diversity jurisdiction in such a suit. Carving a single controversy into pieces—Insurer vs. Insured in the bankruptcy court, Insurer vs. Injured Party in the district court—nominally yields jurisdiction over each suit but creates the possibility of inconsistent outcomes (which has come to pass) and does not really solve the jurisdictional problem, for Rovell is an indispensable party under Fed. R. Civ. P. 19. He has a stake in the outcome because victory for Adco would restore the policy as an asset in the bankruptcy, remove the possibility that discharge will be denied for wasting the estate's assets, and affect the recoveries of other creditors; Adco's claim is derivative of Rovell's contract with Home. We need not trace through the consequences, however, because there is an independent source of federal jurisdiction.

Home's adversary proceeding in Rovell's bankruptcy named not only Rovell but also Adco. After entering the default judgment against Rovell, the bankruptcy judge expressed doubt that he had jurisdiction over the dispute between Adco and Home and encouraged Home to dismiss the case and refile it in the district court. Home followed this advice, creating the problem we have discussed. It is a problem the bankruptcy judge could and should have averted. Its root is the default *judgment* against Rovell, as opposed to a notation of default. In a suit against multiple defendants a default judgment should not be entered against one until the matter has been resolved as to all. *Frow v. De La Vega*, 82 U.S. (15 Wall.) 552 (1872). (Fed. R. Bankr. P. 7054(a), incorporating Fed. R. Civ. P. 54(b), permits a bankruptcy judge to enter final decision with respect to a single party in a multi-party case, but the judge did not use this power—nor was this an appropriate case for its use.) Having entered judgment prematurely against Rovell, the bankruptcy judge could have saved the day by

adjudicating Home's claim against Adco. The insurance policy is an asset of Rovell's estate, Adco is a creditor, and the disposition of the claim may affect how much Adco and other creditors receive. Home versus Adco therefore was within the bankruptcy court's jurisdiction. See *UNR Industries, Inc. v. Continental Casualty Co.*, 942 F.2d 1101, 1103 (7th Cir. 1991); *In re Xonics, Inc.*, 813 F.2d 127, 131-32 (7th Cir. 1987). More: it is *still* "a proceeding . . . related to a case under title 11", 28 U.S.C. §157(b)(3), and "relatedness" jurisdiction is available whether the claim is before a bankruptcy judge or a district judge. See 28 U.S.C. §1334(b) ("the district courts shall have . . . jurisdiction of all civil proceedings . . . arising in or related to cases under title 11"). That all proceedings in Rovell's bankruptcy have been stayed until the insurance coverage dispute has been resolved is a testament to the link between the two.

The district judge's failure to withdraw the reference from the bankruptcy judge complicates matters, but not fatally. A district judge should not hear as an original matter any part of a bankruptcy case it has referred to a bankruptcy judge without first withdrawing the reference "in whole or in part, . . . on its own motion or on timely motion of any party, for cause shown." 28 U.S.C. §157(d). No motion was made, and no cause was shown, in this case. But a judge's failure to follow orderly procedures for allocating bankruptcy matters within a district court does not deprive the court of subject-matter jurisdiction. It is an error, no doubt, but the kind of error that leads to reversal only if a party protests. Neither Home nor Adco challenges the district court's decision to resolve the case, and as it had adjudicatory competence no more need be said.

On to the merits. Home undertook in the malpractice policy

> [t]o pay on behalf of the Insured all sums in excess of the deductible amount . . . which the Insured shall become legally obligated to pay as damages as a result of CLAIMS FIRST MADE AGAINST THE INSURED

> DURING THE POLICY PERIOD AND REPORTED TO THE COMPANY DURING THE POLICY PERIOD caused by any act, error or omission for which the Insured is legally responsible, and arising out of the rendering or failure to render professional services for others in the Insured's capacity as a lawyer or notary public.

The policy ran from April 1, 1994, to April 1, 1995, and would have entitled Rovell to coverage on Adco's malpractice claim, which was filed on October 21, 1994, if he had reported the claim to Home. But he did not, and Home did not learn of the suit from Adco until after April 1, 1995. Even under an occurrence policy, which links coverage to the date of the tort rather than of the suit, an insurer has a strong interest in prompt notice about claims, so that it can investigate or settle them. See *Transport Insurance Co. v. Post Express Co.*, 138 F.3d 1189, 1191-92 (7th Cir. 1998). Illinois gives insureds a "reasonable" time to notify insurers under occurrence policies. E.g., *Barrington Consolidated High School v. American Insurance Co.*, 58 Ill. 2d 278, 319 N.E.2d 25 (1974). A claims-made policy imposes a more rigid notice requirement, because it links coverage to the claim and notice rather than to the injury. Timing of suit and notice determines which policy applies—if any does. Coverage for claims made in a later period requires an additional premium, which Rovell did not pay. The district court's decision effectively required Home to cover more than one year's claims, but for only one year's premium. Because Rovell was uninsured for claims made after April 1, 1995, delay has had adverse consequences for Adco, but, for purposes of determining whether notice after the termination of a claims-made policy gives rise to coverage under that policy, Rovell's failure to pay for an additional period of coverage cannot matter. Home is bound only for the year's coverage it contracted to supply. The question at hand is whether Illinois enforces notice requirements in claims-made policies. As far as we can see, it does. *Cincinnati Insurance Co. v. Baur's Opera House,*

Inc., 694 N.E.2d 593 (Ill. App. 4th Dist. 1998); *American Country Insurance Co.*, 289 Ill. App. 3d at 250, 682 N.E.2d at 372. No case we have found, and none Adco has cited, invokes public policy to require the underwriter of a claims-made policy to defend or indemnify a claim of which it did not learn until after the policy expired. (We could imagine an argument for a little leeway if a suit had been filed against Rovell at the close of business on April 1, 1995; claims-made policies sometimes provide a short time for notice of claims made at the tail end of coverage, although this allowance also may come at a price. Because Adco's suit was filed with ample time remaining for notice, we need not explore the subject.)

Seizing on the statement in *Reagor* that "neither the insured nor the insurer, acting separately or together, may act to defeat the rights of the injured person" (*Reagor*, 92 Ill. App. 3d at 105, 415 N.E.2d at 516), Adco maintains that its rights vested at the time of injury, so that Rovell's failure to comply with the policy's notice requirement came too late to defeat coverage. But propositions so abstract rarely decide concrete cases. In *Reagor* the insured notified the insurer and performed all of the policy's requirements; later the insured and insurer agreed that the policy did not cover the claim. All *Reagor* holds is that this bare agreement is not conclusive against an injured party, any more than a cancellation of the policy (after the accident) and a refund of the premium to the insured would be. *Scott* holds that the insured's decision to accept workers' compensation coverage does not establish, in an action between the victim and the insurer, that the insured was an "employee" of the firm that paid benefits, and therefore that the accident was outside the policy's scope. *France* has nothing to do with Adco's contentions; it holds that the insurer may limit coverage to the vehicle named in the policy, foiling efforts by the insured to fool the insurer into thinking that the insured truck (rather than an uninsured truck) had been involved. None of these cases holds or even suggests that a policy's stated conditions of coverage are unenforceable.

Cooperation and defense clauses then would be wiped out along with notice requirements. Suppose Rovell had notified Home in time but then refused to make his records available, or had insisted on managing the defense himself (despite a clause turning control over to Home), or had stipulated to liability. By the district court's reasoning, none of these events would relieve Home of its duty to indemnify. If an insurer must pay despite lack of notice, cooperation, and an opportunity to control the defense, the price of coverage will skyrocket—if the market can continue to exist. Nothing we have seen in the state cases suggests that Illinois has taken that path.

Adco's retainer agreement with Rovell did not require Rovell to carry malpractice insurance. Illinois permits clients to hire uninsured lawyers. The state does not have any statute for lawyers comparable to the law requiring drivers to carry liability insurance, and to our knowledge no court has interpreted the Code of Professional Responsibility to imply such a mandatory-insurance obligation. Cf. *Weisblatt v. Chicago Bar Association*, 292 Ill. App. 3d 48, 684 N.E.2d 984 (1st Dist. 1997). If it is proper to practice law without insurance, then it is also possible for lawyers to purchase claims-made policies with inflexible notice requirements, rather than occurrence policies with more lenient provisions. Illinois courts routinely enforce these agreements and so, therefore, must we.

In the end none of this may matter—for Adco was represented in the litigation against Taylor by Jenner & Block, of which Rovell was then a partner, and may have recourse against the firm's assets or insurance. Moreover, Adco's coplaintiff in the Taylor suit, to whom Rovell supposedly diverted winnings in violation of his duties to Adco, is a partnership in which Adco has an interest. Indirect recovery through the partnership may be as good as direct recovery. Whatever claim remains against Rovell must be satisfied by Rovell personally, if he is liable for anything—a subject we have not broached, because like the

district judge we have taken Adco's contentions at face value.

One last issue requires brief comment. We assumed when discussing subject-matter jurisdiction that Home and Adco are the only parties. That is not quite right. Dismayed by some statements in the district court's opinion, Rovell sought leave to intervene under Fed. R. Civ. P. 24 after judgment. Though Rovell disclaimed any interest in the suit's outcome, the district court allowed him to intervene *on the same side as Home* for the purpose of clarifying some facts for the court. That was a mistake, and not only because the motion to intervene was untimely (after judgment), unnecessary (Rovell could have made his views known as *amicus curiae*), inappropriate (if as the district court believed Rovell had no interest in the outcome, how could he be a party?), and created jurisdictional problems (if Rovell had been aligned as a defendant, as he should have been, diversity of citizenship would have vanished). As a debtor in bankruptcy, Rovell has a fiduciary duty to his creditors not to squander property of the estate, see 11 U.S.C. §§ 704(1), 1107(a), including his interest in the policy. *In re United States Brass Corp.*, 110 F.3d 1261, 1268 (7th Cir. 1997); *Tringali v. Hathaway Machinery Co.*, 796 F.2d 553, 560-61 (1st Cir. 1986) (Breyer, J.); cf. *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983). A debtor in possession must act in the best interests of his creditors. Wasting assets during bankruptcy (or the preceding year) is a ground for denial of discharge. 11 U.S.C. §§ 727(a)(2), 1141(d)(3)(C). By failing to notify Home and then abetting its effort to avoid coverage Rovell has betrayed his creditors by reducing the assets available to satisfy a judgment, should Adco prevail in the malpractice litigation.

The judgment of the district court is reversed, and the case is remanded with instructions to enter a declaratory judgment that Home has no duty to defend or indemnify Rovell in Adco's suit.

APPENDIX B

[Dated December 3, 1997]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE HOME INSURANCE COMPANY OF ILLINOIS,	)	
Plaintiff,	)	
and	)	
MICHAEL J. ROVELL,	)	
Intervenor-Plaintiff,	)	
v.	)	96 C 6464
ADCO OIL COMPANY,	)	Judge Robert W. Gettleman
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff, The Home Insurance Company of Illinois ("Home"), has filed a complaint[1] for declaratory judgement against defendant, Adco Oil Company ("Adco"), alleging that it is not liable to indemnify Adco for Adco's claim against Home's insured, Michael J. Rovell ("Rovell"). Home seeks a judgment declaring that: (1) Rovell breached the Notice of Claims provision of his insurance policy with Home; (2) Home has no duty or

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[1] Jurisdiction is based on diversity of citizenship. 28 U.S.C. 1441. The parties agree that Illinois law applies.

obligation to defend Rovell against Adco; and (3) Home be awarded its just and reasonable costs for prosecuting this suit.

Home and Adco filed motions for summary judgment pursuant to Fed. R. Civ. P. 56. On June 5, 1997, this court issued an opinion in which it denied Home's motion for summary judgment and granted Adco's cross-motion for summary judgement. At that time, Rovell was not a party to the suit. Thereafter, Home filed a motion to reconsider and Rovell filed a petition to intervene and a motion to reconsider. Rovell argues in his petition to intervene that certain factual statements made by the court in its June 5 opinion will damage his reputation. Rovell asserts that the court's statements were based on allegations that were made by Adco, and were not disputed by Home. In light of Rovell's petition to intervene and the motions to reconsider, the court provisionally vacated its June 5 opinion and order.

The court hereby grants Rovell's petition to intervene for the sole purpose of clarifying certain factual statements made by the court in its June 5 opinion regarding Rovell's behavior. Rovell is not being permitted to intervene in order to address the merits of the instant dispute between Home and Adco. For the reasons set forth below, this court denies Home's motion to reconsider, denies Rovell's motion to reconsider, denies Home's motion for summary judgment, and grants Adco's cross-motion for summary judgment.

FACTS

Home issued its insurance policy No. CPL-C106252 to Rovell, a lawyer, as the insured party. The policy was effective from April 1, 1994, to April 1, 1995. The policy sets for the scope of coverage, in pertinent part, as follows:

> I. Professional Liability and Claims-Made Clause:
>
> To pay on behalf of the insured all sums in excess of the deductible amount stated in the Declarations which the Insured shall become legally obligated to pay as damages as a result of CLAIMS FIRST MADE AGAINST THE INSURED DURING THE POLICY PERIOD AND REPORTED TO THE COMPANY DURING THE POLICY PERIOD caused by any act, error, or omission for which the Insured is legally responsible, and arising out of the rendering or failure to render personal services for others in the Insured's capacity as a lawyer or notary public. [emphasis in original].
>
> Home's "policy period," as used in the insuring agreement, is defined as follows:
>
> "Policy Period," whenever used in this policy, means the period from the inception date of this policy expiration date as set forth in the Declarations or its earlier termination date, if any.
>
> Section "F" of the Policy reads in pertinent part:
>
> I. Notice of Claims: As a condition precedent to the right to the protection afforded by this insurance, the Insured shall, as soon as practicable, give to the Company written notice of any claim made against the Insured.
>
> In the event suit is brought against the Insured, the Insured shall immediately forward to the Com-

> pany every demand notice, summons, or other process received directly or by the Insured's representatives.

On October 21, 1994, Adco filed an action against Rovell in the United States District Court for the Western District of Oklahoma alleging malpractice (the "Adco malpractice action"). According to the malpractice complaint, Rovell intentionally and negligently breached his duties to Adco, causing millions of dollars in damages. Apparently, the Adco malpractice action is still pending.

The first notice Home had of the Adco malpractice action was a June 9, 1995, letter from Adco to Home stating that Adco had filed suite against Rovell. According to Adco, Rovell has admitted in his bankruptcy proceeding (described below) that he intentionally did not notify Home of the malpractice suit because he regarded Adco's claims as frivolous, he believed that filing a claim would negatively impact his future insurance premiums, and he would have to pay the $10,000 deductible. In addition, Adco contends that Rovell deliberately concealed his malpractice policy with Home—allegedly in violation of Local Rule 17 of the United States District Court for the Western District of Oklahoma—until after the policy period expired on April 1, 1995. Home does not dispute these claims of deception by Rovell to defeat policy coverage of Adco's malpractice claims against him.[2]

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[2] Rovell concedes before this court, as he did before the bankruptcy court, that he intentionally did not notify Home of the Adco malpractice action. Rovell also admits that he did not notify Adco of the existence of his insurance policy until the

(continued...)

Sometime after the policy expired, Rovell filed a petition for bankruptcy in the United States Bankruptcy Court for the Northern District of Illinois. On May 13, 1996, pursuant to an order of the bankruptcy court, Rovell tendered his defense in the Adco malpractice action to Home. Home filed a declaratory judgment action against Rovell and Adco in the bankruptcy court. On September 20, 1996, the bankruptcy court entered a default judgment against Rovell based on Rovell's failure to file a responsive pleading in that action and found that Home had no duty to defend Rovell in the Adco malpractice action. As a result of Rovell's default, Home filed the instant declaratory judgement complaint against Adco in this court.[3]

Home's motion for summary judgment contends: (1) the policy is unambiguous and Adco's claim against Rovell was not reported to Home within the policy period; and (2) as a result, the insuring agreement of the policy was not triggered, and Home is entitled to a

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[2] (...continued)
end of April, 1995, after the policy had expired on April 1, 1995. Rovell, however, asserts that he did not intend to conceal the policy and that he did not violate Local Rule 17 of the Oklahoma district court. Rovell has submitted a Local Rule 12(N) statement supporting his version of events in response to Adco's 12(M) statement. Ultimately, the truth or falsity of Adco's allegations against Rovell will be determined in the Adco malpractice action. This court need not address the merits of that action to resolve the instant dispute between Home and Adco.

[3] In light of his default in the bankruptcy court, it is particularly appropriate that this court is limiting the scope of Rovell's intervention and preventing him from addressing the merits of the dispute between Home and Adco.

declaration that it has no duty or obligation to defend Rovell in the Adco action.

Adco's cross-motion for summary judgment contends that: (1) neither the insured nor the insurer's conduct after the insuring event may defeat its rights as an intended beneficiary of the insurance contract; and (2) the policy language is ambiguous and must be construed in favor of coverage.

DISCUSSION

I. SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56(c), a court should grant a summary judgment motion if "there is no genuine issue of material fact and . . . the moving party is entitled to judgement as a matter of law." The burden is on the moving party to identify portions of the pleadings, answers to interrogatories, and affidavits which demonstrate an absence of a genuine issue of material fact. *Id.*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to "set forth specific facts showing that there is genuine issue for trial." Fed. R. Civ. P. 56(c). When reviewing a summary judgment motion, the court must read the facts in a light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

II. CONTRACT CONSTRUCTION

The construction of an insurance policy's provisions and the determination of rights and obligations are questions of law for the court and are appropriate sub-

jects for disposition by summary judgment. *Crum and Forster Managers Crop. v. Resolution Trust Corp.*, 156 Ill.2d 384, 620 N.E.2d 1073, 1077 (1993); *see Millers Mut. Ins. Assoc. of Illinois v. Graham Oil Co.*, 282 Ill. App.3d 129, 133, 668 N.E.2d 223, 227 (1996). If the words in an insurance policy are plain and unambiguous, the court will afford them their plain, ordinary meaning and will apply them as written. *Miller's Mut. Ins. Assoc.*, 668 N.E.2d at 227; *see United States Fire Ins. Co. v. Schnackenberg*, 88 Ill.2d 1, 429 N.E.2d 1203 (1981). The court will not search for ambiguity where there is none. *United States Fire Ins. Co.*, 429 N.E.2d at 1204.

In the instant case, there is no ambiguity in the terms of the contract. Its language clearly indicates that it is a "claims made and reported" policy, which requires a claim to be reported within the inception and expiration dates of the contract. These contracts pervade the liability insurance industry. *See e.g., United States v. A.C. Strip*, 868 F.2d 181 (6th Cir. 1989) (where policy read: "[t]he Company shall pay on behalf of the Insured . . . as a result of Claims first made against the insured and reported to the Company during the Policy Period . . . ."); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Bauman*, 1992 WL 1738 (N.D. Ill. Jan. 2, 1992) (where policy read: "[a] claim shall be considered to be reported to the Company when the Company, or its authorized agent, first receives written notice of the claim or . . . event"), *aff'd*, 997 F.2d 305 (7th Cir. 1993).

Adco does not deny that the instant policy is a "claims made and reported" policy. It also does not

claim that the instant policy is an "occurrences" policy, which allows a claim to be made against an insurer within a "reasonable time" if the event arose within the policy dates, regardless of whether that claim is made during or after the policy period.

Rather, Adco contends that the policy is ambiguous because it contains two conflicting clauses that suggest different constructions of the policy terms: (1) the coverage clause, which states that the notice to the insurer must occur during the policy period, and (2) Section "F", which states that the insurer must receive notice of a claim "as soon as practicable." This court must consider the policy as a whole, with due regard to the risk undertaken by the insurance carrier, the subject matter insured, and the purposes of the entire contract, to determine if an ambiguity exists. *Millers Mut. Ins. Assoc.*, 668 N.E.2d at 227.

In a policy where "claims made and reported" and "as soon as practicable" language co-exist, courts have found that the "as soon as practicable" language is intended to preclude an insured who has knowledge of a claim near the beginning of the policy period, from waiting many months until near the end of the policy period to notify the insurer of the existence of the claim, when such delay would cause prejudice to the insurer. It does not excuse, modify, or render ambiguous the claim reporting requirement recited in the Notice of Claim provision as a condition of coverage. *A.C. Strip*, 868 F.2d at 186-87.

Thus, the court finds that the terms of the contract are not ambiguous and require that claims be made and reported during the policy period. If this action involved

only the insured, Rovell, and the insurer, Home, this holding would compel judgment for Home. However, as discussed below, the vesting of rights in a third-party beneficiary leads to a contrary result.

III. ILLINOIS INSURANCE LAW AND PUBLIC POLICY CONSIDERATIONS

As noted in Adco's summary judgment brief: "It is the public policy of Illinois to protect third-party beneficiaries of liability insurance claims by preventing either an insurer or an insured from acting separately or together to defeat the vested rights of the injured party." Adco relies on *Reagor v. Travelers Ins. Co.*, 92 Ill.App. 3d 99, 415 N.E.2d 512 (1980), which found that the injured parties had standing to bring a declaratory judgment action against the insurer, and that as a beneficiary of a liability policy, an injured person has rights under the policy that vest at the time of occurrence giving rise to his injuries. *Id.* at 514. Home does not deny that Adco has standing to bring a claim in the instant case or that Adco's rights under the policy had vested at the time the Adco malpractice action was filed.

The question to be decided, therefore, is whether the insured lawyer, Rovell, can unilaterally defeat the vested rights of Adco, the injured party or beneficiary, of Home's malpractice policy. The answer is no—the Illinois courts have recognized that once the injured party's rights vest, "[n]either the insured nor the insurer, acting separately or together, may defeat the rights of the injured person." *Reagor*, 415 N.E.2d at 514.

The *Reagor* court cited *France v. Citizens Casualty Co.*, 400 Ill. 55, 59, 79 N.E.2d 28, 30 (1948), for the above-quoted statement of public policy. The *France* court relied on *Scott v. Freeport Motor Casualty Co.*, 392 Ill. 332, 64 N.E.2d 542 (1945), for the same principle. In *Scott*, the Illinois Supreme Court held (for the first time in Illinois) that acts by the insured, occurring after an accident giving rise to a policy claim, could not defeat the claim by the injured party. The court noted that an Illinois statute provided that all policies insuring any person against loss or liability for death or injury to the person or property of another are deemed to provide that the insurance carrier would be liable to the injured third party to the same extent that the carrier would be liable to the insured. *Scott*, 64 N.E.2d at 548-49. Rejecting the carrier's claim that conduct by its insured cut off the injured party's right to recover under the policy, the court held:

> "It would be an injustice to such injured party if the law would permit the acts of the insured occurring after the accident to defeat the policy. The statute is a declaration of public policy and its purpose is to benefit the public who are injured by the negligent operation of an automobile which is described in the policy. Any other application of the law would permit an insured, acting alone as in this case, or in conjunction with the insurer, to defeat the purposes for which the statute was enacted."

Id. at 549.

In the instant case, application of these principles compels the conclusion that Rovell's act of intentionally failing to report Adco's claim cannot defeat Adco's right to recover under the policy. Like the accidents in

Reagor and *Scott*, Adco's claim was first made against the insured, Rovell, during the policy period. Had Rovell reported the claim before April 1, 1995, there would be no question that Home's malpractice policy would have covered it. The policy lapsed only because Rovell failed either to report the claim himself or to disclose the existence and terms of his insurance policy to Adco so that it could report the claim. The public policy of Illinois does not permit such unilateral conduct to defeat the vested rights of the insured.

In support of its motion to reconsider, Home argues that the court's reliance on *Reagor* is flawed because the issue before the *Reagor* court was one of standing, making the *Reagor* court's discussion of injured parties as third party beneficiaries of insurance contracts "pure dictum". Apparently, Home misunderstands the meaning of the term dictum. "A dictum is 'any statement made by a court for use in argument, illustration, analogy or suggestion. It is a remark, an aside, concerning some rule of law or legal proposition that is not necessarily essential to the decision and lacks the authority of adjudication.'" *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988) (quoting *Stover v. Stover*, 485 A.2d 783, 786 (Md. App. 1984)); *see also*, *Black's Law Dictionary* 454 (6th ed. 1990) ("Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand or obiter dicta, and lack the force of an adjudication"). The *Reagor* court's discussion of Illinois public policy was essential to the court's resolution of the issue before it. It was, therefore, not dicta. On the contrary, the *Reagor* court clear-

ly pronounced an Illinois public policy broad enough to control the result in the instant case.

Home also relies on *Esmailzadeh v. Johnson & Speakman*, 869 F.2d 422 (8th Cir. 1989), in its motion to reconsider. In *Esmailzadeh*, the plaintiffs attempted to serve a complaint alleging legal malpractice on a law firm, Johnson & Speakman, ("the firm") while a "claims made and reported" insurance policy issued to the firm by Pacific Employers Insurance Company ("Pacific") was in effect. The service was ineffective, and the firm did not report the plaintiffs' attempted service to Pacific at that time. The firm later purchased a separate "claims made and reported" policy from New York Insurance Exchange, Inc. ("Exchange"). The firm did not disclose the fact that the plaintiffs had attempted to serve a complaint against it when it obtained the policy from Exchange. The plaintiffs effected service of their malpractice complaint against the firm on the day that the coverage by Exchange began. Several months later, the firm reported the plaintiffs' claim to Pacific and the underwriters of the policy issued by Exchange.

The plaintiffs obtained judgement against the firm, which assigned its claims against the insurance companies to the plaintiffs. The district court rejected the plaintiffs' attempt to hold Pacific liable because the plaintiffs' claim was made, but not reported, during the policy period. The Court of Appeals affirmed, finding that Pacific "clearly disclaim[ed] the risk of failure on the part of its insured to give it timely notice." This court, however, is not persuaded. *Esmailzadeh* is not binding precedent in this circuit. Moreover, *Esmailzadeh* involved the application of Minnesota law, not

the public policy of Illinois. Finally, there is no indication in the *Esmailzadeh* opinion that Minnesota embraces the broad public policy favoring third-party beneficiaries announced by the *Reagor* court.

It should also be noted that in addition to the policy considerations addressed by *Reagor* and *Scott*, the instant case involves serious charges of attorney misconduct. Regardless of a lawyer's view of the merits of a client's malpractice claim or his concern for his own pocketbook, it is apparent to this court that a lawyer has a duty to protect a client's rights under his malpractice policy. Especially in light of a local rule requiring disclosure, a lawyer certainly should not take deliberate steps to defeat a client's rights under his malpractice policy by concealing the policy and its terms.[4]

Thus, Illinois public policy not only provides that "injured members of the general public are beneficiaries of liability insurance policies," *Reagor*, 415 N.E.2d at 514, it also prevents the "injustice to [the] injured party" that would result if the insured—whose interests are usually adverse to the injured party's—were able unilaterally to defeat that party's vested rights. *Scott*, 64 N.E.2d at 549. This injustice would be particularly acute where the insured is an attorney and the injured party is a client (even a putative client) who filed a malpractice action during the period the policy was in effect.

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[4] Rovell argues that Adco assigned its claims to a third party, Hugoton Joint Venture ("HJV"), that HJV—not Adco—retained him to litigate those claims, and that Adco was, therefore, not his client. The court need not resolve this dispute to render judgement in the instant case.

CONCLUSION

Home's motion for summary judgment is denied and Adco's cross-motion for summary judgment is granted.[5] Home's motion to reconsider is denied. Rovell's motion to reconsider is denied.[6]

ENTER: December 2, 1997

Robert W. Gettleman
United States District Judge

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[5] Adco asserts that it submitted its cross-motion for summary judgment so that this court could "determine, as a matter of law, that [Home] has an obligation, under the terms of [Rovell's insurance policy,] to pay damages Adco sustained which were directly caused by Rovell's legal negligence and breach of fiduciary duty." The court cannot grant Adco this relief because Adco did not file a counterclaim seeking a declaration that Home is obligated to pay any judgment Adco might be awarded in the Adco malpractice action against Rovell. The fact that Rovell failed to report Adco's claim does not entitle Home to a declaration that it has not duty to defend Rovell against Adco. Yet, the resolution of other factual disputes not before this court—such as whether Adco was actually Rovell's client—could still result in the denial of coverage. Accordingly, this ruling has the effect only of entering judgement for Adco and against Home in the instant declaratory judgment action.

[6] Home also filed a motion to strike, as irrelevant, certain paragraphs of Adco's Local Rule 12(M) statement that refer to the Adco malpractice action. That motion is denied as moot, although the court notes that many of the statements about Rovell's alleged misdeeds toward Adco are contained in the complaint in the Adco action attached to Home's Rule 12(M) statement, and are vigorously denied by Rovell. Finally, Home's motion to strike Adco's prayer for attorneys' fees is granted in light of Adco's failure to contest that motion.

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

October 5, 1998.

Before

Hon. William J. Bauer, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Diane P. Wood, Circuit Judge

The Home Insurance Company of Illinois,

Plaintiff-Appellant,

No. 98-1055 v.

Adco Oil Company,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 C 6464—Robert W. Gettleman, Judge.

ORDER

Adco Oil Company filed on September 18, 1998, a petition for rehearing with suggestion for rehearing en banc. The judges on the panel have voted to deny the petition for rehearing, which is denied, and no judge in active service has called for a vote on the suggestion for rehearing en banc, which is rejected.

Michael J. Rovell lodged with the court a "Motion to Delete and/or Clarify Certain Portions of the Court's Opinion". This document was not accompanied by a motion for leave to file, and the Clerk's Office accepted it in error. It is now returned, unfiled. Although the district judge permitted him to intervene as a party, Rovell did not participate in the appeal. It is entirely inappropriate for an interested person to disregard the litigation and then appear after judgement to contend that the court should have written a different opinion. We observed that the district judge should not have permitted this maneuver; we decline to do so in this court.